FILED
OCT 28 1993
OFFICE OF THE CLERK

No. 93-420

In the
Supreme Court of the United States
October Term, 1993

Isaiah Green, Jr.,
Petitioner,

v.

North Carolina Department Of Transportation,
Division of Motor Vehicles,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

Harold F. Askins*
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 733-3254

**Counsel of Record*

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the Fourth Circuit's upholding of summary judgment -- which disregarded race discrimination findings on the same issue by an administrative law judge, a state agency and a superior court -- undercut the policy of federal and state governments, not to mention this Court, to construct and enhance state administrative schemes to help eliminate employment discrimination?

2. Is the Fourth Circuit's slight of findings of race discrimination by a North Carolina administrative law judge after a due process hearing and by a state Superior Court judge who reviewed the hearing's transcript and evidence, inconsistent with 28 U.S.C. § 1738, other Circuits, and decisions of this Court?

This page intentionally left blank.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 2

A. The Proceedings Below 2

B. Statement of the Facts 4

REASONS FOR DENYING THE WRIT 7

I. THE QUESTIONS WHICH PETITIONER PRESENTS THIS COURT FOR REVIEW DO NOT ARISE IN THIS CASE. PETITIONER'S CIVIL ACTION FILED IN FEDERAL DISTRICT COURT DID NOT RAISE THE ISSUES REACHED AND DECIDED BY THE EARLIER REVIEWED NORTH CAROLINA ADMINISTRATIVE PROCEEDING. 7

A. The Reviewed Findings Which Petitioner Contends the Courts Below Should Have Given Preclusive Effect Stem from an Instance of Alleged Discrimination Other Than Those Alleged in This Action. . 8

B. Petitioner Failed to Properly Raise, in the District Court and on Appeal, the Issue of the Preclusive Effect of the Reviewed State Administrative Proceedings. 9

C. Petitioner Failed to Comply with the Requirements of 28 U.S.C. § 1738 When He Failed to Provide the District Court with Properly Certified and Authenticated Copies of the Reviewed State Court Proceedings. 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES:

Alsager v. District Court of Polk County, Iowa, 518 F.2d 1160 (8th Cir. 1975) 10

Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) 9

Horwitz v. State Board of Medical Examiners of the State of Colorado, 822 F.2d 1508 (10th Cir. 1987), *cert. denied*, 484 U.S. 964 (1987) 12, 13

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 9

Sartin v. Commissioner of Public Safety of the State of Minnesota, 535 F.2d 430 (8th Cir. 1976) 9

University of Tennessee v. Elliott, 478 U.S. 788 (1986) 9

Youakim v. Miller, 425 U.S. 231 (1976) 9

FEDERAL STATUTE:

28 U.S.C. § 1738 . . . . . 7, 10-13

This page intentionally left blank.

No. 93-420

In the
Supreme Court of the United States
October Term, 1993

Isaiah Green, Jr.,
Petitioner,

v.

North Carolina Department Of Transportation,
Division of Motor Vehicles,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent North Carolina Department of Transportation, Division of Motor Vehicles, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's unpublished *per curiam* opinion in this case.

STATEMENT OF THE CASE

A. The Proceedings Below

On or about February 26, 1986, petitioner filed a grievance in the North Carolina Office of Administrative Hearings (hereinafter OAH) alleging racial discrimination. (App 1a-5a) On April 29, 1986, petitioner filed a discrimination charge, alleging the same facts, with the Equal Employment Opportunity Commission (EEOC). (App 7a-10a) The EEOC issued a determination that no reasonable cause was found to believe the allegations made were true on August 22, 1986. (App 11a-12a) On October 24, 1986, a North Carolina Administrative Law Judge made a nonbinding recommended decision finding discrimination. (Pet App 37a-46a) This became binding upon the respondents following review by the North Carolina Superior Court. (Pet App 31a-36a)

On March 2, 1987, petitioner filed a second EEOC complaint charging racial discrimination. (App 13a-18a) This complaint alleged some of the same facts pled in the 1986 grievance filed with the OAH and in the 1986 EEOC complaint and alleged retaliation for filing the April 29, 1986 EEOC complaint. Petitioner also filed the same charge with the OAH at approximately the same time. On March 28, 1989, the OAH determined that no cause existed for this charge. (App 19a-20a)

On October 5, 1987, petitioner filed a third EEOC complaint alleging racial discrimination based upon his allegedly discriminatory rate of pay. (App 21a-23a) On

March 21, 1989, the OAH, as the deferral agency, found no reasonable cause existed for this charge. (App 25a-26a) The EEOC, on June 26, 1989, reached the same conclusion. (App 27a-28a)

On October 27, 1988, petitioner filed his fourth EEOC complaint charging racial discrimination in refusing to transfer him, as well as retaliation for three prior EEOC complaints. (App 29a-31a) The OAH, again, determined that no reasonable cause existed for the charge. (App 33a-34a)

On March 9, 1990, the EEOC determined there to be no cause for the March 2, 1987 and October 27, 1988 charges, and thereupon issued right to sue letters. (App 35a-36a, 37a-38a) On June 7, 1990, petitioner filed a civil action pursuant to 42 U.S.C. § 2000(e) *et. seq.* (Title VII) based upon these right to sue letters. (App 39a-47a) On July 21, 1992, the United States District Court for the Middle District of North Carolina granted the respondent's motion for summary judgment. (Pet App 5a-30a)

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. On May 18, 1993 the Fourth Circuit issued an unpublished *per curiam* opinion finding petitioner's appeal without merit and affirming the district court's grant of summary judgment. (Pet App 3a-4a) Petitioner then filed a petition for rehearing and suggestion for rehearing *in banc*. (App 49a-66a) The circuit court denied that petition on June 14, 1993. (Pet App 1a-2a)

B. Statement of the Facts

Petitioner is an African-American who voluntarily transferred from the North Carolina Highway Patrol to the Enforcement Section of the North Carolina Department of Transportation, Division of Motor Vehicles (hereinafter Division). He was aware, at the time of his transfer, that the Division would assign him as a Vehicle Inspection Officer I (VIO I) which was compensated at a lower rate than he had earned in the Highway Patrol. He nonetheless consented to this pay decrease. The Division placed him at pay grade sixty-one, the very top pay scale for the VIO position. Petitioner was assigned to Hillsborough, North Carolina, whereupon he immediately requested a transfer to Raleigh, North Carolina.

Three and one-half years later, on January 1, 1985, the Division promoted petitioner to Law Enforcement Officer I (LEO I) and transferred him to Rocky Mount, North Carolina. His pay scale was increased to pay grade sixty-nine, increasing his salary by forty-five percent. He again requested a transfer to Raleigh.

On February 1, 1986, the Division hired Emanuel Bristle to fill a LEO I position in Raleigh. Bristle is a white male with a Bachelor's degree and a Master of Arts degree in criminal justice. At the time he had twelve years of experience in law enforcement.

On March 4, 1986, pursuant to N.C. GEN. STAT. § 150B-23 (1983), petitioner filed a petition with the North Carolina Office of Administrative Hearings (OAH) alleging

that the Division had discriminated against him because of his race by hiring Bristle instead of transferring petitioner to Raleigh. A decision was rendered for the petitioner. This decision was subsequently affirmed, in part, by the North Carolina Office of State Personnel and the Superior Court for Wake County, North Carolina.

On April 29, 1986, the petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination because of the Bristle hiring. Unlike the OAH, the EEOC determined that there was no just cause for the charge.

On October 8, 1986, the Division hired Ronald Reams (Reams) for a LEO position in Raleigh. Petitioner again filed a petition with the OAH and with the EEOC complaining of racially motivated discrimination against him. These petitions were both dismissed.

In March of 1988, the Division offered to transfer petitioner to a LEO I position in Raleigh. Petitioner refused this transfer stating that the position was that of an undercover officer, and was of low status.

In October of 1988, two LEO's already stationed in Raleigh swapped job assignments. Petitioner erroneously perceived this as the creation of two new positions and a failure by the Division to transfer him to either position. He filed another complaint with the EEOC alleging racial discrimination. Again, the EEOC found no just cause for the charge.

On January 30, 1990, petitioner filed yet another EEOC complaint alleging racial discrimination regarding the pay of a newly hired LEO I and the reclassification of another LEO. The EEOC determined there to be no just cause for this charge, whereupon petitioner filed a Title VII action in the Federal District Court for the Eastern District of North Carolina. Petitioner subsequently voluntarily dismissed that case.

On May 1, 1990, the Division transferred petitioner to a LEO I position in Raleigh.[1]

Petitioner based this action, filed June 7, 1990, upon his March 9, 1990 right to sue letters from the EEOC. In the complaint here, petitioner recites his failure to receive a merit raise (Complaint ¶ 6) as well as an October 8, 1986 denial of a transfer (Complaint ¶ 9) and alleged retaliation for having filed earlier EEOC charges as evidencing the discrimination. (App 43a-44a) The right to sue letters from the EEOC terminated charges other than the charge filed April 29, 1986 concerning the Bristle hiring. The facts underlying that EEOC charge also formed the basis of the parallel OAH proceeding in which petitioner obtained a favorable ruling in Superior Court.

In his complaint, petitioner also asserted claims under 42 U.S.C. § 1981 (1988) and North Carolina state common law, but later abandoned these claims. The district court

---

[1] Petitioner was promoted to the position of Assistant District Supervisor (LEO II) pay grade 71, effective November 1, 1992.

granted summary judgment for the respondents on the Title VII action and the Fourth Circuit affirmed in an unpublished *per curiam* opinion.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS WHICH PETITIONER PRESENTS THIS COURT FOR REVIEW DO NOT ARISE IN THIS CASE. PETITIONER'S CIVIL ACTION FILED IN FEDERAL DISTRICT COURT DID NOT RAISE THE ISSUES REACHED AND DECIDED BY THE EARLIER REVIEWED NORTH CAROLINA ADMINISTRATIVE PROCEEDING.

Petitioner requests that this Court issue its Writ of Certiorari to consider the district court's alleged disregard of reviewed race discrimination findings by a state administrative agency. Petitioner asserts that such disregard contravenes an expressed policy to construct and enhance state administrative schemes aimed at the elimination of employment discrimination and violates the full faith and credit requirement set forth in 28 U.S.C. § 1738. The record of the proceedings below indicates that neither of these questions arise in this litigation. The complaint here alleges instances of discrimination not raised or decided in the reviewed state administrative proceeding. Additionally, petitioner, in the courts below, failed to assert the preclusive effect of such proceedings except as a footnote in his motion for reconsideration filed with the court of appeals. Finally, petitioner failed to comply with the requirements of 28

U.S.C. § 1738 in that he never provided the district court with properly authenticated copies of the purportedly preclusive state court proceeding. Petitioner raises no issues ripe for certiorari review by this Court.

A. The Reviewed Findings Which Petitioner Contends the Courts Below Should Have Given Preclusive Effect Stem from an Instance of Alleged Discrimination Other Than Those Alleged in This Action.

Petitioner contends that the district court should have given preclusive effect to the findings of the OAH determined in a case filed with that agency on March 1, 1986. This 1986 case stemmed from the respondent's failure to transfer petitioner to an LEO position in Raleigh, N.C. and the hiring of Emanuel Bristle to fill that position. Petitioner's Title VII action, however, arose from two subsequent EEOC and OAH complaints. These complaints, one filed in 1987 and the other in 1988, alleged, as discrimination, respondent's failure to transfer petitioner and the hiring of Ronald Reams to an LEO position in Raleigh. Petitioner's complaint filed in the district court specifically refers to the right-to-sue letters issued in those actions and not the right-to-sue letter from the 1986 EEOC complaint. The OAH found no reasonable cause in both of those subsequent complaints, and the EEOC concurred. In short, no reviewed state court proceedings addressed the discriminatory conduct complained of by petitioner in this action.

University of Tennessee v. Elliott, 478 U.S. 788 (1986), and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) plainly require an identity of claims in the reviewed state proceeding and the federal Title VII action. Here, the record indicates that this civil action rests upon different claims of discrimination and supporting facts than the reviewed state administrative findings. Petitioner demonstrates no expressed or implied policy contravened by the district court's summary judgment rendered against him upon a claim and facts distinct from those considered by the OAH. This Court should decline to issue its Writ.

B. Petitioner Failed to Properly Raise, in the District Court and on Appeal, the Issue of the Preclusive Effect of the Reviewed State Administrative Proceedings.

Petitioner failed, before the district court and in the court of appeals, to assert the preclusive effect of the reviewed state court proceedings. As a result, neither the district court nor the circuit court considered or decided the issue. This Court should not issue its Writ to decide such questions neither raised in nor passed upon by the courts below. *See Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The propriety of such holding appears especially true with regard to preclusion issues. In the context of *res judicata* and collateral estoppel as affirmative defenses, the courts have repeatedly held that if these defenses are not pled at trial, they will not be heard on appeal. *See Sartin v. Commissioner of Public Safety of the State of Minnesota*, 535

F.2d 430 (8th Cir. 1976), *Alsager v. District Court of Polk County, Iowa*, 518 F.2d 1160 (8th Cir. 1975). The preclusive effect of a state proceeding appears similar.

In his Petition for Rehearing and Suggestion for Rehearing *in banc*, petitioner acknowledges that the preclusion claim was not "raised by either side below." Petition for Rehearing and Suggestion for Rehearing *in banc* at 5 n.1. (App 54a) Yet, he now couches the majority of his argument in support of this Court's Writ of Certiorari in terms of this issue. Petitioner allowed the district court no opportunity to consider the preclusive effect of the earlier determination on this Title VII action in light of the facts and circumstances giving rise to this claim. In light of petitioner's failure to raise and obtain a ruling upon this issue in the lower courts, this Court should deny Certiorari.

C. Petitioner Failed to Comply with the Requirements of 28 U.S.C. § 1738 When He Failed to Provide the District Court with Properly Certified and Authenticated Copies of the Reviewed State Court Proceedings.

Petitioner contends that the district court should have given the reviewed state court proceedings preclusive effect in this Title VII action. The full faith and credit portion of 28 U.S.C. § 1738 clearly applies under such circumstances, including the authentication provisions thereof. Section 1738 states in relevant part:

> The records and judicial proceedings of any court of any such State, Territory or Posses-

> sion, or copies thereof, *shall be proved or admitted* in other courts within the United States and its Territories and Possessions *by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.*
>
> Such Acts, records and judicial proceedings or copies thereof, *so authenticated*, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State. . . .

28 U.S.C. § 1738 (1989) (emphasis added).

This statute, in explicit detail, sets forth the manner by which state judicial proceedings must be authenticated in order to receive full faith and credit by other courts. In fact, almost two-thirds of its text is addressed to the proper method of authentication. Section 1738 then provides that acts and judicial proceedings authenticated in accordance with its prescribed methods will be given full faith and credit. While the language does not, in specific words, proscribe the granting of full faith and credit to unauthenticated judicial proceedings, the construction of the statute indicates that such result was exactly intended by the drafters. Indeed, because the statute so thoroughly discusses methods of authentication, the reasonable conclusion, by implication, is that the statute requires full faith and credit be given *only* to

judicial proceedings authenticated pursuant to its prescribed terms.

The record before the lower courts reveals that the petitioner, in his brief opposing the motion for summary judgment, submitted only photostatic copies of the North Carolina Administrative Law Judge's findings, and of the opinions of the North Carolina Office of State Personnel and Wake County Superior Court. These copies were not certified or authenticated in any other way. (Pet App 31a-36a) As such, the records clearly do not conform with the strict authentication provisions of § 1738. The district court was, therefore, not obligated by § 1738 to grant these state judicial proceedings full faith and credit.

In *Horwitz v. State Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508 (10th Cir. 1987), *cert. denied*, 484 U.S. 964 (1987), the Court of Appeals for the Tenth Circuit faced a situation very similar to the one now before this Court. There, the party opposing a motion for summary judgment (appellees) raised, for the first time on appeal, a defense of *res judicata*, citing an opinion rendered by the Colorado State Court of Appeals concerning the transactions subsequently brought before the Federal District Court. The Tenth Circuit noted that the appellees had failed to timely inform the district court of the state court decision, and had otherwise failed to demonstrate why the court should consider the *res judicata* argument for the first time on appeal. Of equal importance to the disposition of the case at bar, the *Horwitz* Court stated that an authenticated copy of the state court opinion was absent from the record on appeal

"as required under 28 U.S.C § 1738 in order to have full faith and credit effect." 822 F.2d at 1512.

Petitioner failed to comply with the authentication requirements of 28 U.S.C. § 1738. Thus, both the district court and the circuit court properly failed to consider the preclusive effect of the proceeding, even had petitioner properly raised the issue. Under such circumstances, this Court's Writ of Certiorari ought not issue.

CONCLUSION

Petitioner presented no issue ripe for consideration by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Harold F. Askins*
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0619
(919) 733-3254

October 28, 1993

*Counsel of Record

APPENDIX

CONTENTS OF APPENDIX

OAH Grievance of Februray, 1986 . . . . . 1a

Hearing request information form of February, 1986 . . . . . 3a

EEOC Charge of April 29, 1986 . . . . . 7a

EEOC Determination of August 22, 1986 . . . . . 11a

EEOC Charge of March 2, 1987 . . . . . 13a

OAH Determination of March 28, 1989 . . . . . 19a

OAH Charge of Discrimination of October 5, 1987 . . . . . 21a

OAH Determination of March 21, 1989 . . . . . 25a

EEOC Determination of June 26, 1989 . . . . . 27a

OAH Charge of Discrimination of October 27, 1988 . . . . . 29a

OAH Determination of July 17, 1989 . . . . . 33a

EEOC Determination of March 9, 1990 (EEOC No. 141870562) 35a

EEOC Determination of March 9, 1990 (EEOC No. 141890057) 37a

Summons, United States District Court, Middle District of North Carolina 39a

CONTENTS OF APPENDIX (Continued)

Complaint, United States District Court, Middle District of North Carolina 41a

Petition for Rehearing 49a

February 17, 1986

Isaiah Green Jr.
3222 Holiday Dr.
Raleigh, N.C. 27610

To: State Personnel Commission

RE: Racial Discrimination in Employment Practices

Dear Chairperson,

I am a employee with the Department of Motor Vehicles, serving in the capacity of a Law Enforcement Officer, and have served the citizens of North Carolina in such a capacity for some 17 years. I am presently serving as a LEO-I (Inspector), and is stationed at Hillsborough N.C. I was previously stationed at Rocky Mount, N.C., but was requested by my then immediate supervisor, Mr. P.E. Holmes, district III supervisor, to laterally transfer to Hillsborough N.C. to assist LEO-I (Inspector) Manuel Cruz, who was recently hired by DMV and stationed at Hillsborough N.C. This transfer was to facilitate Inspector Cruz so he could come back home, and it was to assist the Department of Motor Vehicles inasmuch that Inspector Cruz was familiar with the Rocky Mount area and the people that lived there. This transfer was worked out between acting Director of DMV Enforcement Section, Mr. B.N. Hopper, D.S. P.E. Holmes (Raleigh), D.S. J.S. Hill (Greensboro), Inspector Cruz and myself with the understanding that when Position No. 72810 became available in Wake Co. that I

could laterally transfer to Wake Co. where my family is now living. I was to be given priority over anyone else who had lesser time in grade than I had. I agreed to transfer under these conditions. When the job posting came out for the Wake Co. position, I contacted Mr. Donald W. Stahl, the new director of DMV Enforcement concerning submitting a letter for a lateral transfer, and he advised that I could go ahead an [sic] submit the letter, but the Federal Government was putting pressure on them to hire a female. He told me, more than likely a female would be hired. On February the 3rd, 1986, a Mr. Manuel Bristol, a white male was hired for the position in Wake Co. The DMV (Enforcement Section) has only 5 Black Inspectors in the state as it relates to minority representation, taking in consideration a total compliment of 110 LEO-I's. Raleigh, the capitol of this great state has no minority representation. The Black Community and Legal Counsel would suggest that D.O.T. redress such an issue, it being that Manuel Bristol is a white male and no prior service given in the job capacity which he now holds. The Black Community and Legal Counsel consider this to be a Racial Injustice and trust that some remedial action be taken to rectify such an issue, it being that the Black Community deserve [sic] the representation.

Thank you,

s\Isaiah Green Jr.
Isaiah Green, Jr.

HEARING REQUEST INFORMATION FORM

INSTRUCTIONS: Please fill in all information that applies to your grievance. If you have any questions, call the Employee Relations Division at (919) 733-7112. Sign this form on the back and have it notarized. Return this form as soon as possible to: Chief Hearing Officer, Office of State Personnel, 116 West Jones Street, Raleigh, North Carolina 27611.

NAME Isaiah Green, Jr.

ADDRESS 3222 Holiday Dr.

Raleigh, N.C.

ZIP 27610 PHONE [Home](919) 772-1798
[Business](919) 732-7826

EMPLOYER AGENCY D.M.V. - Enforcement Section

PAYGRADE 69

MONTHS OF CONTINUOUS 56 with D.M.V. Enf. Sec.

GRIEVANCE ISSUE(S): Dismissal ___ Demotion ___
Suspension ___ Promotion ___
Other Lateral Transfer

Discrimination:

Race X Sex _____ Age _____
National Origin _____ Religion _____
Handicapping Condition _____
Political Affiliation _____ Other _____

MY GRIEVANCE CONCERNS

RACIAL DISCRIMINATION IN EMPLOYMENT PRACTICES

WHEREAS A BLACK CAREER EMPLOYEE REQUESTED A

LATERAL TRANSFER TO WAKE CO. (POSITION NO.

72810) AND WAS DENIED, PRIORITY BEING GIVEN TO

A NEWLY HIRED WHITE MALE EMPLOYEE IN THIS POSITION.

THE EMPLOYEE HIRED IS MR. E.C. BRISTLE.

[Use additional pages, if necessary, to explain your grievance.]

ATTORNEY - YES X / NO _____
If Yes, NAME Anita R. Davis

ADDRESS Suite 220 - 205 Fayetteville Street Mall
P.O. Box 1708 Raleigh N.C. 27602

PHONE 828-8787

IF I AM SUCCESSFUL IN MY GRIEVANCE, I WOULD LIKE TO HAVE THE FOLLOWING REMEDIES:

TRANSFERRED LATERALY TO POSITION NUMBER 72810 IN

WAKE COUNTY. ATTORNEY FEES PAID TO THE COMMISSION

LEVEL OF REPRESENTATION. PAYMENT MADE FOR TIME

INVOLVED IN TRAVEL FROM RALEIGH N.C. TO DURHAM AND

HILLSBOROUGH, N.C., TO DUTY STATION, AND RETURNING

TO RALEIGH, PAYMENT FOR GASOLINE AND CAR EXPENSE, ALL BEGINNING 2-3-86 UNTIL THE RESOLUTION OF THIS GRIEVANCE.

Isaiah Green, Jr. being first duly sworn, deposes and says that he/she is the Grievant in this matter; that he/she has read the above information and that the information set forth above is true and factual to the best of his/her knowledge, information and belief.

s\Isaiah Green Jr.
GRIEVANT

Sworn and subscribed to before me,
this 26th day of February, 1986.

s\Sherry L. Dixon SEAL
NOTARY PUBLIC

My commission expires: 5-14-90

This page intentionally left blank.

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER
___ FEPA _X_ EEOC 018860691

Received EEOC
Raleigh Area Office
Raleigh, N.C.
Apr 29 11:38 AM '86
and EEOC

_____
(State or Local Agency, if any)

NAME *(Indicate Mr., Ms., or Mrs.)*
Mr. Isaiah Green, Jr.

HOME TELEPHONE NO.*(Include Area Code)*

STREET ADDRESS: 3222 Holiday Drive
CITY, STATE, AND ZIP CODE: Raleigh, NC 27610
COUNTY: Wake

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more then one list below.)*

NAME
NC Dept. of Transportation
(Division of Motor Vehicles)

NO. OF EMPLOYEES/MEMBERS: 407

TELEPHONE NO. *(Include Area Code)*
919-733-7872

STREET ADDRESS: 1100 New Bern Avenue
CITY, STATE, AND ZIP CODE: Raleigh, N.C. 27967

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

_XX_RACE(B) ___COLOR ___SEX ___RELIGION
___NATIONAL ORIGIN ___AGE ___RETALIATION
___OTHER *(Specify)*

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, year)*

January 8, 1986

THE PARTICULARS ARE *(If additional space is needed, attached [sic] extra sheet(s)):*

I. On January 8, 1986, I was denied a transfer from Hillsborough, NC to Wake County, NC as a Law Enforcement Officer I. I have been employed by the State of North Carolina since August, 1968. The Division of Motor Vehicles employs about 407 employees.

II. Donald W. Stahl, White, Director, told me during December 1985 that the Federal Government was putting pressure on him to hire a female for Wake County.

III. I believe that I am being discriminated against because of my race (Black) for the following reasons:

A. P. E. Holmes, White, District III Supervisor, requested that I transfer from Rocky Mount to Hillsborough, NC to help Manuel Cruz, Hispanic. I was told that I would be transferred to Wake County when an opening became available by P. E. Holmes.

B. Manuel Cruz was allowed to transfer from Hillsborough to Rocky Mount during September 1985. Rocky Mount is Manuel Cruz's home. He did not want to move his family to Hillsborough.

C. My transfer from Rocky Mount to Hillsborough and Wake County was worked out between P. E. Holmes, District III Supervisor, Acting Director B.N. Hopper, White, and J.S. Hill, White, District IV, and myself.

D. I was denied a transfer from Hillsborough to Wake County on January 8, 1986 by Donald W. Stahl, White, Director. Wake County is where my family resides.

E. Between December 1, 1984 and April 1, 1986, nine (9) White Law Enforcement Officers have been allowed to transfer. They are C. E. Nance, K. N. Riley, S. A. Hall, B. R. Davis, J. S. Saintsing, P. M. Kuebler, G. W. Tutterow, J. A. Sipes, and J. W. Turney.

___ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

4-29-86 s/Isaiah Green, Jr.
Date Charging Party (Signature)

Notary - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

RALEIGH AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
127 W. HARGETT ST., SUITE 500
RALEIGH, N.C. 27601

Charge Number: 018860691

Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N.C. 27610

Charging Party

and

North Carolina Department of Transportation
Division of Motor Vehicles
1100 New Bern Avenue
Raleigh, N.C. 27967

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of only the Title VII allegations of the subject charge filed under Title VII of the Civil Rights Act.

All Title VII jurisdictional requirements have been met. Charging Party alleges that he was denied a transfer because of his race (Black). Examination of the evidence indicates that there is no reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This determination concludes the Commission's processing of the Title VII aspect of the charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of receipt of this letter, and by taking the other procedural steps out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On Behalf of the Commission:

8/22/86
Date

s/Richard E. Walz
Richard E. Walz, Area Director
Raleigh Area Office

Enclosures: Notice of Right to Sue
Copy of the Charge

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER

___ FEPA _X_ EEOC 141870562

OAH and EEOC

(State or Local Agency, if any)

NAME (*Indicate Mr., Ms., or Mrs.*)
Mr. Isaiah Green, Jr.

HOME TELEPHONE NO.(*Include Area Code*)
919-772-1798

STREET ADDRESS	CITY, STATE, AND ZIP CODE	COUNTY
3222 Holiday Drive	Raleigh, NC 27610	Wake

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more then one list below.*)

NAME	NO. OF EMPLOYEES/MEMBERS
NC Dept. of Transportation, Div. of Motor Vehicles- Enforcement Section	407

TELEPHONE NO. (*Include Area Code*)
919-732-7826

STREET ADDRESS	CITY, STATE, AND ZIP CODE
Route 6, PO Box 412	Hillsborough, N.C. 27278

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

_X_ RACE(B) ___ COLOR ___ SEX ___ RELIGION
___ NATIONAL ORIGIN ___ AGE _X_ RETALIATION
___ OTHER *(Specify)*

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, year)*

December 1, 1986

THE PARTICULARS ARE *(If additional space is needed, attached [sic] extra sheet(s)):*

I. On or around September 30, 1986, I was denied a merit increase. I was initially hired in June 1981 and have been employed as a Law Enforcement Officer in Field Inspection since January 1985. The Division of Motor Vehicles - Enforcement Section employs approximately 407 employees, of whom 40 are Black.

II. I have not asked the Division of Motor Vehicles why I was not given a merit increase nor was I given a reason.

According to the Department of Transportation's employee handbook, only 2/3 of the employees in a given department can receive a merit increase.

III. I believe I have been discriminated against on the bases of my race (Black) and in retaliation for filing EEOC #018860691 inasmuch as:

a. On April 29, 1986, I filed EEOC #018860691 in which I alleged I was denied a lateral transfer due to my race (Black).

b. I am the only Law Enforcement Officer I in the Hillsborough, NC Office. I received an "acceptable" rating on my performance appraisal.

c. There are 3 Caucasian Law Enforcement Officer Is in Respondent's Greensboro, NC facility. These 3 Law Enforcement Officer Is received an "acceptable" rating on their performance evaluations. However, these Caucasians Law Enforcement Officer Is received 50% of a step increase while I did not receive a merit increase. Another Black Law Enforcement Officer I, i.e., Alfonza Everett, who works in Respondent's Greensboro, NC Office, received 25% of a step increase even though he received an "acceptable" rating on his performance appraisal.

IV. I believe that the NC Department of Motor Vehicles discriminates against Blacks as a class in regards to pay increases.

I. Since December 1, 1986, and continuing, I have been paid unequal wages in comparison to my Caucasian counterpart.

II. I have not asked the Division of Motor Vehicles why I was being paid unequal wages nor have I been given a reason.

The NC Department of Transportation employee handbook does not address the issue of salaries.

III. I believe that I have been discriminated against on the bases of my race (Black) and in retaliation for filing #018860691 inasmuch as:

a. I am currently paid $25,692.00 annually and have been employed with the Division of Motor Vehicles for 6 years. I had 12 years of law enforcement experience before joining the Division of Motor Vehicles.

b. Mark Last Name Unknown (Caucasian), was hired in August 1985 and had 8 years of previous law enforcement experience. However, Mark Last Name Unknown is paid at least $31,000 annually.

IV. I believe that the NC Department of Transportation pays its Black employees lower salaries than its Caucasian employees even though these Caucasian employees do not have any special education or experience which would explain the difference in these salaries.

I. On October 8, 1986, I was denied a lateral transfer from Respondent's Hillsborough, NC Office to Respondent's Raleigh, NC Office.

II. I have not asked Respondnet why I was denied this lateral transfer nor was I given a reason.

According to Respondent's transfer policy, an employee is automatically qualified provided that the transfer is between classes having comparable qualification requirements.

III. I believe I have been discriminated against on the bases of my race (Black) and in retaliation for filing EEOC #018860691 inasmuch as:

a. Instead of transferring me, Respondent hired Robert Reams (Caucasian), from "off-the-street" for the position of Law Enforcement Officer I in Raleigh, NC. While I am not aware of Mr. Reams qualifications for the position in question, I believe that I was the better qualified candidate in that I have 18 years of law enforcement experience.

b. To the best of my knowledge, there has never been a Black employed as a Law Enforcement Officer I - Enforcement Section in Respondent's Raleigh, NC Office.

c. There have been at least 9 Caucasians who have been lateral transferred during the period 1984 thru 1986.

___ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

3-2-87 s/Isaiah Green, Jr.
Date Charging Party (Signature)

Notary - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

RECEIVED EEOC
RALEIGH AREA OFFICE
RALEIGH N.C.
MAR 2 2 04 PM '87

STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS
CIVIL RIGHTS DIVISION

March 28, 1989
OAH CHARGE #87-EEO-0184

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
NC Department of Transportation
Highway Building
1 South Wilmington Street
Raleigh, N.C. 27611

Re: Letter of Determination

Dear Mr. Green:

Under the authority vested in me by this agency's procedural regulations, I issue, on behalf of the Office of Administrative Hearings, the following Determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act.

The Respondent is an employer within the meaning of Title VII and all timeliness, jurisdictional and deferral requirements have been met. Charging Party alleges that he was discriminated against in violation of Title VII of the Civil Rights Act, as amended, by being denied a merit increase because of his race (Black) and by being paid unequal wages and denied a lateral transfer because of his race (Black) and in retaliation for having filed a previous charge. Examination of the evidence indicates that there is

no reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This Determination concludes this agency's processing of your employment discrimination charge. You are advised that you may appeal our Determination in your charge to EEOC within fifteen (15) days of the receipt of this letter. Our investigative files will be forwarded to the EEOC office which deferred your charge.

If you should have any questions concerning our Determination of the merits of your charge, please contact Ms. Paula Richardson at 733-0431.

On Behalf of the
Office of Administrative Hearings

s/Edward T. Smith
Edward T. Smith, Director
Civil Rights Division

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER
___ FEPA __ EEOC 141880012

N.C. Office of Administrative Hearings and EEOC
(State or Local Agency, if any)

NAME *(Indicate Mr., Ms., or Mrs.)*
Mr. Isaiah Green, Jr.

HOME TELEPHONE NO.*(Include Area Code)*
919-772-1798

STREET ADDRESS	CITY, STATE, AND ZIP CODE	COUNTY
3222 Holiday Drive	Raleigh, NC 27610	Wake

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more then one list below.)*

NAME	NO. OF EMPLOYEES/MEMBERS
N.C. Dept. of Transportation Div. of Motor Vehicles-Enforcement Section	400

TELEPHONE NO. *(Include Area Code)*
919-733-7872

STREET ADDRESS	CITY, STATE, AND ZIP CODE
1100 New Bern Avenue	Raleigh, N.C. 27697

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

_X_ RACE(B) ___ COLOR ___ SEX ___ RELIGION
___ NATIONAL ORIGIN ___ AGE ___ RETALIATION
___ OTHER *(Specify)*

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, year)*

August 31, 1987

THE PARTICULARS ARE *(If additional space is needed, attached [sic] extra sheet(s)):*

I. At a District meeting in Greensboro, NC on August 31, 1987, I learned that I was being paid a lesser salary than my Caucasian counterpart who works in Salisbury, NC. I have been employed with the Department of Motor Vehicles since 1981. Prior to that, I was with the Highway Patrol for ten (10) years. I am currently a Law Enforcement Officer I in Hillsborough, NC. I have been in this position for three (3) years. The Department of Motor Vehicles employs approximately 400 employees.

II. I did not ask nor was I given a reason for my being paid a lesser salary than my Caucasian counterpart.

III. I believe that I have been discriminated against because of my race (Black).

___ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

10/5/87
Date

s/Isaiah Green, Jr.
Charging Party (Signature)

Notary - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

This page intentionally left blank.

STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS
CIVIL RIGHTS DIVISION

March 21, 1989
OAH CHARGE #87-EEO-1012

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
NC Department of Transportation
Division of Motor Vehicles
Highway Building
1 South Wilmington Street
Raleigh, N.C. 27611

Re: Letter of Determination

Dear Mr. Green:

Under the authority vested in me by this agency's procedural regulations, I issue, on behalf of the Office of Administrative Hearings, the following Determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act.

The Respondent is an employer within the meaning of Title VII and all timeliness, jurisdictional and deferral requirements have been met. Charging Party alleges that he was discriminated against in violation of Title VII of the Civil Rights Act, as amended, by being paid a lesser salary than another employee because of his race (Black). Examination of the evidence indicates that there is no

reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This Determination concludes this agency's processing of your employment discrimination charge. You are advised that you may appeal our Determination in your charge to EEOC within fifteen (15) days of the receipt of this letter. Our investigative files will be forwarded to the EEOC office which deferred your charge.

If you should have any questions concerning our Determination of the merits of your charge, please contact Ms. Paula Richardson at 733-0431.

On Behalf of the
Office of Administrative Hearings

s/Edward T. Smith
Edward T. Smith, Director
Civil Rights Division

RALEIGH AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
127 W. Hargett St., Suite 500
Raleigh, N.C. 27601
Charge Number: OAH #87-EEO-1012
EEOC 141880012

Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N.C. 27610

Charging Party

and

NC Dept. of Transportation
Division of Motor Vehicles
Highway Bldg. - 1 S. Wilmington St.
Raleigh, North Carolina 27611

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning to Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the North Carolina Office of Administrative Hearings.

Having examied [sic] the North Carolina Office of Administrative Hearing's findings and the record presented,

I conclude that there is not reasonable cause to believe the charge is true.

This concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private lawsuit in Federal District Court within 90 days of receipt of this Decision (please refer to the enclosed Information Sheet of Filing Suit in Federal Court).

Unless the Commission receives notification that the Charging Party has filed suit in Federal District Court, the case file will be destroyed one (1) year after the date of this letter in accordance with the Commission's records disposition procedures.

On Behalf of the Commission;

6/26/89 — s/Richard E. Walz

Date — Richard E. Walz, Director

Enclosures:
Copy of Charge
Information Sheet on Filing
Suite [sic] in Federal Court

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER

___ FEPA X EEOC 141890057

OAH and EEOC

(State or Local Agency, if any)

NAME (*Indicate Mr., Ms., or Mrs.*)
Mr. Isaiah Green, Jr.

HOME TELEPHONE NO.(*Include Area Code*)
919-772-1798

STREET ADDRESS	CITY, STATE, AND ZIP CODE	COUNTY
3222 Holiday Drive	Raleigh, NC 27610	Wake

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more then one list below.*)

NAME	NO. OF EMPLOYEES/MEMBERS
NC Dept. of Transportation Div. of Motor Vehicles-Enforcement Section	407

TELEPHONE NO. (*Include Area Code*)
919-732-9826

STREET ADDRESS	CITY, STATE, AND ZIP CODE
Route 6, PO Box 412	Hillsborough, N.C. 27278

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

_X_ RACE(B) ___ COLOR ___ SEX ___ RELIGION
___ NATIONAL ORIGIN ___ AGE _X_ RETALIATION
___ OTHER *(Specify)*

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, year)*

October 17, 1988

THE PARTICULARS ARE *(If additional space is needed, attached [sic] extra sheet(s)):*

I. On October 17, 1988, I was denied a lateral transfer to the position of Law Enforcement Officer I which was located in Raleigh, NC. I am currently employed as a Law Enforcement Officer I in Hillsborough, NC.

Respondent employs approximately 407 persons.

II. I have not asked the Division of Motor Vehicles why I was not laterally transferred as stipulated by the State's Superior Court.

According to Respondent's transfer policy, an employee is automatically qualified provided transfer is between classes having comparable qualification requirements.

III. I believe that I have been discriminated against on the basis of my race (Black) and in retaliation for filing EEOC #018860691, #141870562 and #141880012.

___ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

10-27-88
Date

s/Isaiah Green, Jr.
Charging Party (Signature)

Notary - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

This page intentionally left blank.

STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS
CIVIL RIGHTS DIVISION

July 17, 1989
OAH CHARGE #88-EEO-1304
EEOC CHARGE #141890057

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
NC Department of Transportation
Division of Motor Vehicles
1 South Wilmington Street
Raleigh, N.C. 27611

Re: Notice of Determination

Dear Mr. Green:

Under the authority vested in me by this agency's procedural regulations, I issue, on behalf of the Office of Administrative Hearings, the following Determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act.

The Respondent is an employer within the meaning of Title VII and all timeliness, jurisdictional and deferral requirements have been met. Charging Party alleges that he was discriminated against in violation of Title VII of the Civil Rights Act, as amended, by being denied a lateral transfer because of his race (Black) and in retaliation for having filed a previous charge. Examination of the evidence

indicates that there is no reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This Determination concludes this agency's processing of your employment discrimination charge. You are advised that you may appeal our Determination in your charge to EEOC in Raleigh (856-4064) within fifteen (15) days of the receipt of this letter. Our investigative files will be forwarded to the EEOC office referenced above.

If you should have any questions concerning our Determination of the merits of your charge, please contact Ms. Paula Richardson at 733-0431.

On Behalf of the
Office of Administrative Hearings

s/Edward T. Smith
Edward T. Smith, Director
Civil Rights Division

RALEIGH AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
127 W. HARGETT ST., SUITE 500
RALEIGH, N.C. 27601

EEOC CHARGE NO.: 141870562
OAH CHARGE NO.: 87-EEO-0184

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
N.C. Department of Transportation
Highway Building
1 South Wilmington Street
Raleigh, N. C. 27611

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the North Carolina Office of Administrative Hearings.

Having examined the North Carolina Office of Administrative Hearing's findings and the record presented, I conclude that there is not reasonable cause to believe the charge is true.

This concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private lawsuit in Federal District Court within 90 days of receipt of this Decision (please refer to the enclosed information Sheet on Filing Suit in Federal Court).

Unless the Commission receives notification that the Charging Party has filed suit in Federal District Court, the case file will be destroyed one (1) year after the date of this letter in accordance with the Commission's records disposition procedures.

On Behalf of the Commission:

3-9-90
Date

s/Richard E. Walz
Richard E. Walz, Director
Raleigh Area Office

Enclosures: Copy of the Charge
Information Sheet on Filing Suit in Federal Court

RALEIGH AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
127 W. HARGETT ST., SUITE 500
RALEIGH, N.C. 27601

EEOC CHARGE NO.: 141890057
OAH CHARGE NO.: 88-EEO-1304

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
N.C. Department of Transportation
Division of Motor Vehicles
1 South Wilmington Street
Raleigh, N.C. 27611

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the North Carolina Office of Administrative Hearings.

Having examined the North Carolina Office of Administrative Hearing's findings and the record presented, I conclude that there is not reasonable cause to believe the charge is true.

This concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private lawsuit in Federal District Court within 90 days of receipt of the Decision (please refer to the enclosed information Sheet on Filing Suit in Federal Court).

Unless the Commission receives notification that the Charging Party has filed suit in Federal District Court, the case file will be destroyed one (1) year after the date of this letter in accordance with the Commission's records disposition procedures.

On Behalf of the Commission:

3-9-90
Date

s/Richard E. Walz
Richard E. Walz, Director
Raleigh Area Office

Enclosures: Copy of the Charge
Information Sheet on Filing
Suit in Federal Court

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF NORTH CAROLINA

ISAIAH GREEN, JR.

SUMMONS IN A CIVIL ACTION

V. CASE NUMBER:

N.C. DEPARTMENT OF
TRANSPORTATION DIVISION OF
MOTOR VEHICLES

TO: (Name and Address of Defendant)

N.C. Department of Transportation
Divison of Motor Vehicles

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

David M. Dansby, Jr.
P. O. Box 21746
Greensboro, N.C. 27420

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

_____

_____

CLERK DATE

_____

BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

ISAIAH GREEN, JR.,	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
-vs-	)	
	)	CIVIL ACTION
	)	NO. 2 90 CV 289
N.C. DEPARTMENT OF	)	
TRANSPORTATION DIVISION	)	
OF MOTOR VEHICLES,	)	
	)	
Defendant.	)	

FIRST CLAIM FOR RELIEF

1.

Jurisdiction is invoked pursuant to 28 USC, Sections 1331, 1343, and 2201. This is an action in equity authorized and instituted pursuant to Title VII of the Act known as "The Civil Rights Act of 1964" 42 USC Section 2000e, et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by Title VII of the Act known as "The Civil Rights Act of 1964", 42 USC, Section 2000e, et seq., providing for injunctive or other relief against racial discrimination in employment. The suit also is authorized under Title 42 USC, Sections 1981

and 1983 and the United States Constitution - more particularly the Fifth and Fourteenth Amendments thereto.

2.

This is a proceeding for a permanent injunction restraining the Defendant from maintaining a policy practice, custom and usage of withholding or attempting to withhold or deny and depriving or attempting to deprive the Plaintiff and members of his class of employment opportunities and rights solely on the ground of race and color. This is also a proceeding for monetay [sic] damages for the deprivation of the Civil Rights of the Plaintiff.

3.

That the Plaintiff is a Black male citizen of the United States and a resident of Raleigh in the State of North Carolina. The Plaintiff is an employee of the Defendant, North Carolina Department of Transportation.

4.

That the Defendant, N.C. Department of Transportation, is a division and agency of the State of North Carolina. That the Defendant maintains offices in Greensboro, Hillsborough, in Raleigh, and in most counties in the State and employs in excess of four hundred persons.

5.

That the Plaintiff was initially hired by the Defendant in June of 1981 as a Law Enforcement Officer.

6.

That the Plaintiff was denied a merit increase eventhough all of the white employees employed in Defendant's Greensboro, North Carolina facility received fifty percent of a step merit increases and the other Black person in the Greensboro facility received twenty-five percent of a step increase eventhough all parties received an "acceptable" rating.

7.

The Plaintiff and other Blacks are discriminated against as a class in pay and that December 11, 1986, the Plaintiff has been paid unequal wages in comparison to his white counterparts.

8.

That the Plaintiff was initially hired at an annual pay rate of $26,692.00 eventhough a white with less experience was hired at an initial annual pay rate of $31,000.00.

9.

On October 8, 1986, the plaintiff was denied a lateral transfer from the Hillsborough Office to the Raleigh Office and the position eventhough the Defendant's policy was to grant transfers routinely when there were vacancies and the Plaintiff was denied the transfer which was given to a white, because of his race.

10.

That the Plaintiff filed timely and proper complaints with the Equal Employment Opportunity Commission on March 2, 1987 and on October 27, 1988, alleging denied by Defendant of his rights under Title VII of the Civil Rights Act of 1964, 42 USC, Section 2000e, et. seq. On March 9, 1990, the Plaintiff received a Notice of Right To Sue.

SECOND CLAIM FOR RELIEF
(Retaliation)

11.

That on October 17, 1988, the Plaintiff was denied a requested lateral transfer to a position in Raleigh, North Carolina, eventhough the Defendant had been ordered by the North Carolina Superior Court to grant the Plaintiff the lateral transfer.

12.

That the failure to transfer the Plaintiff was in retaliation for charges the Plaintiff had filed with the Equal Employment Opportunity Commission on March 2, 1987, October 5, 1987 and Equal Employment Opportunity Commission Charge No. 01886091.

THIRD CLAIM FOR RELIEF
(Denial Of Transfers)

13.

That the actions of the Defendant in denying the Plaintiff's requested transfers violated the Plaintiff's rights under 42 USC 1981, 42 USC 1983, and 42 USC 2000e, et seq.

14.

That the actions were done under color of law, customs and usuage [sic].

15.

That the denial of the transfers caused the Plaintiff to have to drive long distances to his place of employment in Greensboro and Hillsborough at great expense to the Plaintiff.

FOURTH CLAIM FOR RELIEF
(1981, 1983 Claims)

16.

That the denial has caused the Plaintiff emotional and mental anguish.

17.

That the plaintiff is entitled to back pay to make up for the pay differential with interest.

18.

That the actions of the Defendant were malicious and willfully done with the knowledge that the actions would harm the Plaintiff economically and emotionally.

FIFTH CLAIM FOR RELIEF
(Intentional Infliction of Mental Anguish
- State Cause of Action)

19.

That the Defendant willfully and intentionally refused to give the Plaintiff a lateral transfer and willfully and intentionally refused to pay the Plaintiff wages and salary comparable to that paid white employees and such willful conduct on the part of the Defendant was either willful, deliberate and purposefully calculated to cause the Plaintiff mental anguish or the said conduct was in reckless disregard of the consequences with full knowledge that the great emotional and mental anguish would be caused the Plaintiff as a result thereof.

20.

That the Plaintiff in fact suffered great emotional and mental anguish.

WHEREFORE, the Plaintiff prays the Court:

1. That a permanent injunction issue enjoining the defendant, its agents, successors, and employees, from continuing or maintaining the policy, practice, custom and

usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the Plaintiff's rights to equal pay and equal treatment in his employment.

2. That the Plaintiff be awarded back pay including all wages and wage differentials occasioned by the denial of equal pay, including interest and cost of living adjustments.

3. That the court take pendant jurisdiction of the other actions including the State Cause of Action.

4. That the Plaintiff recover compensatory damages in the amount of $20,000.00 for the denial of the Plaintiff's constitutional rights to equal treatment in employment and the Plaintiff's right to equal pay.

5. That the plaintiff be awarded punitive damage in the amount of $20,000.00.

6. That the Plaintiff be awarded costs, including reasonable attorneys fees and other additional relief as may appear to the Court equitable and just.

7. That a Jury Trial be granted on all issues.

s/David M. Dansby, Jr.
David M. Dansby, Jr.
Attorney For Plaintiff
P.O. Box 21746
Greensboro, N.C. 27420
Telephone: (919) 274-3785
N.C. Bar 1079

This page intentionally left blank.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Isaiah Green, Jr., Plaintiff-Appellant,	)	
v.	)	No. 92-1933
North Carolina Department of Transportation, Division of Motor Vehicles, Defendant-Appellee.	)	

PETITION FOR REHEARING (FRAP 40)
SUGGESTION FOR REHEARING IN BANC (FRAP 35)

Comes now Plaintiff-Appellant, by and through his undersigned attorney, and respectfully petitions this Court for a Rehearing under FRAP 40, or Suggests a Rehearing In Banc of the Decision in the above-captioned Case No. 92-1933.

INTRODUCTION

Plaintiff-Appellant, as a basis for this petition and suggestion, respectfully shows the Court that several material facts were overlooked in the decision which was rendered on May 18, 1993, by this Court.

BRIEF STATEMENT OF THE CASE

The Middle District Court of North Carolina on June 21, 1992, granted a Rule 56 Summary Judgment in this Title VII claim on July 21, 1992. This Court adopted the District Court's Judgment without comment on May 18, 1993. Plaintiff-Appellant herewith timely files his Petition for Rehearing In Banc.

ARGUMENT

The District Court made several erroneous statements of fact in its judgment. These errors were apparently adopted by this Court in its Per Curiam Opinion. If these errors are not corrected, a terrible injustice will have been permitted by our Courts against Plaintiff-Appellant, and discriminatory practices will continue unabated in an important state agency in North Carolina.

The District Court, in its judgment, analyzed three separate issues of alleged race discrimination against Plaintiff-Appellant in the Division of Motor Vehicles: (1) Granting of Merit Raises in the Greensboro DMV Office in 1986; (2) Unfair Hiring Practices and (3) Failure to Transfer. The District Court analyzed each of these issues. Its Summary Judgment analysis overlooked critical facts in the Merit Raise Issue and the Transfer Issue which would have clearly met the prima facie test and made the factual issues in dispute, thereby placing this case in a trial posture.

A. Facts Overlooked in Merit Raise Issue

The District Court Judgment said: "Simply put, there is no basis in fact for plaintiff's allegations" regarding racial disparities in the Granting of Merit Raises in the Greensboro DMV Office in 1986. The facts before the Court, when it made that statement were these: there were two African Americans and five white DMV inspectors at that facility in 1986. Merit increases cannot be granted to Inspectors who have worked less than one year. Merit increases in 1986 were granted per the following chart:

1986 MERIT INCREASES AT
GREENSBORO DMV FACILITY

NAME	ELIGIBILITY FOR MERIT INCREASE	RACE	STEP INCREASE
I. Green	yes	B	0
A. Everette	yes	B	1/4
C. Wesson	yes	W	1/2
J. Turney	yes	W	1/2
W. Emerson	yes	W	1/2
R. Mann	no	W	0
G. Tutterow	no	W	0

Plaintiff (Black) received no merit increase. Alfonzo Everette, the other Black Inspector, received 1/4th step increase. Plaintiff and Everette had been employed in the department for at least 5 years. Compare these to the white inspectors: the three white inspectors who had been in the department for more than two years all received 1/2 step merit increases. The two white inspectors, Mann and

Tutterow, cited by the District Court as "comparables," were both ineligible for increases since they had not achieved the requisite "permanent status" by July 1, 1986, when the merit increases were awarded.

These facts were overlooked below. This racial disparity obviously meets the prima facie test, and Plaintiff Appellant should have his day in court to prove that there was racial and/or retaliatory intent behind his not receiving the same merit increase that the only three comparable white inspectors received.

Facts Overlooked in Discriminatory Transfer Decisions

It is unnecessary to show all of the overlooked facts which were in heated dispute in the court below regarding the alleged discriminatory transfer personnel decision. Here, it suffices to focus on just one of the allegedly discriminatory transfer decisions, which the District Court referee [sic] to in its Judgment as "(1) the Department's hiring of Bristle to fill a newly created LEO position for the Emissions Inspection Program in Raleigh in February, 1986." District Court Judgment, p.10.

The Court stated that Bristle was a "non-minority," with no prior state experience. The Court stated that Bristle "came to this post with a Bachelor of Arts Degree and Master of Arts degree in criminal justice and twelve years of law enforcement experience." The Court further found that "the Office of Administrative Hearings made a ruling in plaintiff's favor, but the EEOC declined to do so, finding that there was no just cause for the charge."

The District Court overlooked at least a score of facts which had been found by a North Carolina Office of Administrative Hearings Administrative Law Judge; by the North Carolina State Personnel Commission; and the Superior Court of Wake County, North Carolina, Judge Craig Ellis presiding. These facts were found after a full Due Process Hearing and review of all of the sworn testimony (subject to cross examination).* None of these facts were ever disputed by the EEOC, which made a non-evidentiary, non-preclusive no cause finding in August 22, 1986.

B. Facts Overlooked in Discriminatory Transfer Decisions

It is unnecessary to show all of the overlooked facts which were in heated dispute in the court below regarding the alleged discriminatory transfer personnel decision. Here, it suffices to focus on just one of the allegedly discriminatory transfer decisions, which the District Court referee [sic] to in its Judgment as "(1) the Department's hiring of Bristle to fill a newly created LEO position for the Emissions Inspection Program in Raleigh in February, 1986." District Court Judgment, p.10.

The Court stated that Bristle was a "non-minority," with no prior state experience. The Court stated that Bristle "came to this post with a Bachelor of Arts Degree and Master of Arts degree in criminal justice and twelve years of law enforcement experience." The Court further found that "the Office of Administrative Hearings made a ruling in plaintiff's favor, but the EEOC declined to do so, finding that there was no just cause for the charge."

The District Court overlooked at least a score of facts which had been found by a North Carolina Office of Administrative Hearings Administrative Law Judge; by the North Carolina State Personnel Commission; and the Superior Court of Wake County, North Carolina, Judge Craig Ellis presiding. These facts were found after a full Due Process Hearing and review of all of the sworn testimony (subject to cross examination).[1] None of these facts were ever disputed by the EEOC, which made a non-evidentiary, non-preclusive no cause finding in August 22, 1986, four days before the Administrative Law Judge held a full, due process hearing, which was the basis of these three quasi-judicial, administrative and judicial findings.

Title VII provides that when a state agency has made "final findings and Orders" prior to an EEOC reasonable cause determination, the EEOC "shall accord [therein] substantial weight" in making its decision. 42 U.S.C. Sect. 2000e-5(b) (1982).

Here are some of the facts, numbered and quoted from the state agency's findings ("Recommended Decision,"

---

[1] Although it has not been raised by either side below, and not by Plaintiff-Appellant, acting pro se, before the three-judge panel which first reviewed this case at this Court, Plaintiff-Appellant has a strong case for Preclusion, in that, contrary to Mr. Kremer in Kremer v. Chemical Construction Corp., 4556 [sic] U.S. 461 (1982), Mr. Greene won a difficult race discrimination finding before a State agency which was subsequently affirmed by a State Court. Applying Kremer here would result in these findings having preclusive effect in this Title VII case, and certainly would preclude a Federal Court from denying these findings of fact at the Summary Judgment stage of litigation.

October 24, 1986, Exhibit to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment), which were so overlooked:

1. Mr. Isaiah Green Jr., is employed as a Law Enforcement Officer I (LEO I) with the Division of Motor Vehicles. At the time of this appeal Petitioner [Green] had thirteen (13) years of continuous state service [in 1986.]

3. [Green] is a Black Male who meets the Respondent's qualifications/requirements for the position of LEO I, which he has filled since January 1, 1985.

6. Since being promoted to the LEO I position, the Petitioner's work performance has been rated by his superiors as "overall acceptable" with commendation for participation in the Theft Investigation Program noted on his Work Planning/Performance Review form for the period July 1, 1985, to June 30, 1986.

9. Prior to joining Respondent [DMV] the Petitioner had 10 years of service as a Trooper with the State Highway Patrol which included 960 hours of training at the UNC-CH Institute of Government. Petitioner is a high school graduate and a Certified Law Enforcement Officer.

14. On November 27, 1985 the Respondent by job posting sought applicants for a LEO I position in Wake County.

15. Petitioner applied verbally and in writing for the LEO I position in Wake County and requested a lateral transfer from Orange to Wake County.

16. Donald Stahl, Respondent's Director of Enforcement, advised Petitioner that his request was being considered, but that the subject position would likely be filled by a new hire.

17. Petitioner was not interviewed for the LEO I position in Wake County. Wake County has never had a Black Male serve in a LEO I position. Of 114 LEO I positions in North Carolina, no more than six are filled by Blacks.

18. Respondent employed Emanuel C. Bristle, a White Male, in the position. Bristle was living in Jefferson, North Carolina, when he applied, and wanted to be assigned to Union County, North Carolina.

19. Director Stahl testified that he recommended Bristle's employment based upon information received that Bristle was a college graduate with a master's degree in public administration who had served thirteen years as a policeman in New York with experience in stolen vehicle investigations. Stahl said he wanted Bristle in Wake County because it has a large number of stolen vehicles. Stahl sat in on the interview of Bristle, but did not participate in or conduct it.

20. Respondent filled nine other LEO I positions along with Bristle's, two being females (including 1 Black

Female in Wake County) and seven other white males. The position filled by a Black female was new and not the seat sought by Petitioner, as its beginning salary was much below his current pay.

23. Respondent's officials have not approved Petitioner's repeated requests for a lateral transfer to Wake County so he can continue to reside with his family in Raleigh and not be required to move them to Hillsborough.

27. Respondent's posted qualifications for the subject position were: Graduation from high school and five (5) years of law enforcement or investigative experience; or an equivalent combination of training and experience. Certified Law Enforcement Officer. Involves enforcement of state law and regulations relating to the operation and sale of motor vehicles, laws pertaining to registration, weight, licensing of dealers and manufacturers, theft investigation, liability insurance inspections and the collection of licensing fees. "Recommended Decision," supra.

The District Court further overlooked the Conclusions of Law of the state agency, adopted by the state court, which addressed both the prima facie burden, and the much greater burden of showing discrimination on Petitioner in this same set of facts. The state court of North Carolina upheld the following critical findings:

. . . Petitioner has shown the following:

-that he is a member of a protected class (minority)
-that Respondent was recruiting to fill the vacant LEO I position in Wake County;
-that he applied for the vacant position which he was qualified for and requested a lateral transfer to Wake County;
-that a white person was selected over him.

. . . The Respondent has not clearly articulated legitimate nondiscriminatory reasons for its denial of Petitioner's request for a lateral transfer to Wake County. Donald Stahl testified that he recommended Emanuel C. Bristle because he was a college graduate with a master's degree in public administration who had severed [sic] thirteen years as a policeman in New York with experience in stolen vehicle investigations while Petitioner had only a high school diploma with limited stolen vehicle investigations. Stahl only sat in on Bristle's interview and Petitioner was not even afforded an opportunity to be interviewed by those conducting same. No details were presented as to the interviews or criteria used before recommendations were made to the Commissioner. No college records or transcripts were presented, nor records detailing the work of Petitioner and Bristle in the area of stolen vehicle investigations, except that Petitioner had been commended by his superiors for participation in its theft investigation program and also received a performance salary increase on August 1, 1985.

. . . Even if one were to conclude that Respondent has clearly articulated legitimate nondiscriminatory reasons for its action, it is concluded that the Petitioner has shown

that the stated reasons were, in fact, a pretext for discrimination. Director Stahl testified that of 114 LEO I's across North Carolina, only 5 or 6 are Black. He also stated that of 10 positions filled at the time of Bristle's, 8 were white males, 1 white female, 1 Black female in an entry level position for which Petitioner was not considered, and no Black males. Also, no Black male has ever filled a LEO I position in Wake County." "Recommended Decision."

The Court below dismisses these adjudicated facts and legal conclusions by saying that "while plaintiff may have been qualified for this LEO I position, a reasonable person could readily have decided that Bristle's educational and investigative qualifications were preferable to those of plaintiff. The Court finds that the Department's proffered justification for choosing Bristle over plaintiff on this basis is valid, reasonable and does not give rise to an inference of discriminatory intent. Consequently, since plaintiff cannot establish a prima facie case either through direct evidence of discrimination or indirect evidence that would support a reasonable probability that plaintiff would have been transferred but for his race, his claim must fail." p.11

The District Court misconstrues this Court's clear holding in Mallory v. Booth Refrigeration Supply Co., Inc., 882F 2d [sic] 908 (4th Cir. 1989). There, this Court set aside the "somewhat less exacting . . . formulation" (Id. n.1, p. 910) it had adopted in Holmes v. Bevilacqua, 794 F. 2d 12421, [sic] 147 (4th Cir. 1986) which was overruled by Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2378, (1989).

Here, contrary to the District Court's statement--adopted by this Court--that "plaintiff cannot establish a prima facie case," Plaintiff has clearly met the prima facie hurdle. Patterson and Mallory state that the elements of a prima facie case are: "[the employee] need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee." Mallory, supra. n. 1, p.910.

Having misconstrued the prima facie burden, the District Court then goes on, in a summary judgment, to rule that there was insufficient evidence to support a "reasonable probability" that plaintiff would have been transferred but for his race. The Court ignores the devastating statistics which persuaded three fact-finders who heard or studied direct testimony with cross-examination that the agency had:

(a) Only 5 or 6 Black LEO I officers out of 114 in the State.

(b) Had never had a Black man serve as an LEO I in Wake County.

(c) Had not even interviewed Plaintiff-Appellant for the vacant LEO I position, despite the fact that the Agency had encouraged him to exchange duties with the understanding that he would try to get transferred back to his home county of Wake at the next opportunity.

(d) Of 10 positions filled at the time of Bristle's hiring, 8 were white males, 1 was a white female, and [sic] was a black female to an entry level position.

The Court below had several genuine issues as to the material fact of whether there were racial motives behind the DMV's failure to transfer Plaintiff-Appellant, its failure to give him merit raises, and the other discriminatory decisions before it. The Court ignored the State Court Findings, which have preclusive effect under Kremer v. Chemical Construction Corp. 456 U.S. 461 (1982), and overlooked the abundant facts in the record which meet not only Plaintiff-Appellant's prima facie burden but also his final burden--at least in the eyes of the Superior Court of Wake County, North Carolina--in one of the critical issues in the case.

C. Proper Standard for Summary Judgment in Employment Discrimination Case

"[Summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56 (c).

The mission of this procedure is to "assess the proof in order to see whether there is a genuine need for trial." FRCP 56 Notes of Advisory Committee on Rule 56, 1963 Amendment. Summary judgment is not appropriate where there is a genuine issue of the credibility of a witness.

Here, there is abundant evidence in the record that the North Carolina Division of Motor Vehicles had a miserable record of employing Black LEO 1's, and of giving merit raises to Black LEO 1's. There were no legitimate business reasons given in the due process hearing below for hiring an outside white person instead of transferring Plaintiff-Appellant to the Raleigh office in early 1986.

The Court below mistakenly included two white males who were ineligible for merit raises (they had not yet completed their probationary period when merit raises were granted), which was the only defense on the record for the disparate treatment of granting no or minimum merit raises to the only two Black LEO 1's, while granting the full merit increase to every white LEO 1 who was qualified.

Genuine, stark issues of fact exist in the two prima facie disparate treatments discussed here. There are similar genuine issues of facts in the other discriminatory personnel decisions in this case which were also overlooked below.

Prima facie cases have been made in the two issues discussed here. If the Court, however, believes that legitimate non-racial reasons have been proffered for the personnel decisions under scrutiny, then it must permit Plaintiff-Appellant the opportunity to show that these "legitimate reasons" are pretextual, and that the real reason for the disparate treatment is racial prejudice and retaliation.

The Administrative Law Judge below observed the demeanor of Mr. Stahl. He noted that "no details were presented as to the interviews or criteria used before recom-

mendations were made to the Commissioner." He noted that "no college records or transcripts were presented, nor records detailing the work of Petitioner and Bristle in the area of stolen vehicle investigations." "Recommended Decision" supra, p.5.

In short, a trained trial judge weighed the demeanor of a key witness, and found it lacking. He weighed the non-submission of graduate degrees in Public Administration for a white male who had worked 13 years as a New York police officer and was now applying for a LEO 1 which only required a High School Degree, and he apparently did not believe the whole story.

These facts, including the fact of an Administrative Judge and a State Court Judge finding race discrimination by the agency against Plaintiff-Appellant, are in the record.

In making a summary judgment, the Court must both predict the facts which will be in the trial record and weigh their sufficiency. Here, the prediction is made easier by the detailed findings of the state court below, which has reviewed the full record of a due process hearing. These facts, as they stand, are sufficient to meet precisely the same burden of proof in a hearing below.

These facts are obviously sufficient to meet the much lower standards of summary judgment, where the motion is defeated if there are any genuine issues. Here there are numerous genuine issues, including whether Bristle has a Master's Degree? There has been no proof, and the state court and the findings it affirmed seem to have some doubt.

Furthermore, what was the Master's in, if he has it? Public Administration, as Mr. Stahl testified? Or "criminal justice" as the District Court wrote? Even if Bristle was better qualified than Plaintiff-Appellant, why did Mr. Stahl put Bristle in the one position open in Raleigh, which Plaintiff-Appellant had requested, and not in one of the seven other LEO 1 positions which were open at the same time? Was it because there had never been any Blacks at the Raleigh DMV office, or because Mr. Bristle had an outstanding record on car thefts? Did Mr. Bristle actually have an outstanding record on car thefts?

"Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." FRCP 56, Notes, 1963 Amendment.

Here, given the rare history of a full due process hearing and a finding in state court of discrimination in one of the key issues in the case before this Court, summary judgment must be reversed and a trial ordered.

PRAYER

Therefore, Plaintiff-Appellant respectfully petitions this Court for Rehearing, pursuant to FRAP 40, or, in the alternative, suggests for a Rehearing In Banc, pursuant to FRAP 35.

Further, Plaintiff-Appellant respectfully moves that the Summary Judgment of the District Court in Case No. 92-1933 be reversed, and that a trial on the merits be held.

Plaintiff-Appellant, who represented himself in the original appeal to this Court, is now represented by the undersigned counsel.

This the 27th day of May, 1993.

s/Alan McSurely
ALAN McSURELY
Attorney for Plaintiff-Appellant

157 1/2 E. Franklin Street
Chapel Hill, NC 27514
State Bar # 15540

(919) 968-1278

CERTIFICATE OF SERVICE

I, Alan McSurely, hereby certify that the foregoing Plaintiff-Appellant's Petitioner for Rehearing and Suggestion for Rehearing In Banc has been served on the Defendant-Appellee by deposing [sic] a copy of same in the United States Mail, first-class postage prepaid, addressed as follows:

Harold Franklin Askins
Assistant Attorney General
North Carolina Department of Justice
P. O. Box 629
Raleigh, NC 27602-0629

This the 28th day of May, 1993.

s/Alan McSurely
Alan McSurely